Supplemental Basis Statement and Response to Comments
Chapter 3 Rules Governing the Conduct of Licensing Hearings

List of Commenters

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2. Jennifer Burns Gray, Esq. (orally at hearing and written comment dated 10/19/2012)
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SUMMARY OF COMMENTS BY SECTION

Section 1. Applicability

Comment #1. Commenter #1 recommends inserting the word "adjudicatory" prior to hearing.
Response: The Department disagrees. The Administrative Procedures Act defines an adjudicatory proceeding as one in which the legal rights, duties or privileges of specific persons are required by constitutional law or statute to be determined after an opportunity for hearing. While the Department generally follows the procedures and

requirements set forth in the APA to ensure a fair and orderly hearing, not all hearings held by the Department are technically within the definition of an adjudicatory proceeding. No change was made to the rule.

Comment # 2. Commenter #2 states that use of the word "Department" is confusing. If the rule applies to proceedings before the Board, it should say so.
Response: The term Department is defined in statute and in this rule to consist of both the Commissioner and the Board. When one or the other is intended, the rule specifies the Commissioner or Board; otherwise, the use of the term Department means that the provision applies to both the Board and the Commissioner. No change was made to the rule.

Section 2. Definitions

Comment #3. Section 2(K). License. Commenter #1 questions why the surrender of a license is included in the definition of license.
Response: The surrender of a license requires the permission of the agency and, therefore, meets the definition of license in the Maine Administrative Procedure Act (APA) at 5 MRS § 8002(5). No change was made to the rule.

Comment #4. Section 2(Q). Written Testimony. Commenter #1 recommends inserting the following language into the definition: "Any person submitting written testimony shall be subject to oral cross-examination."
Response: This issue of persons subject to cross-examination is addressed in Section 19(B) of the rule. No change was made to the definition.

Section 3. Form, Service and Filing of Documents

Comment #5. The proposed rule states in Section 3(D) that "Submissions not received by the Department by a prescribed deadline will be deemed untimely, absent a showing of good cause. Commenter #1 requests that the rule define "good cause."
Response: Circumstances that would constitute "good cause" can vary substantially and must be addressed on a case-by-case basis. Courts apply this concept without a specific definition. No change was made to the rule.

Comment #6. With reference to Section 3(E), Commenter #1 asks who must make the application available.
Response: The applicant is responsible for making the application available to the public. The rule has been amended to specify that the applicant must make copies of the complete application reasonably available to the parties and the public.

Comment #7. Commenter #5 recommends deleting the reference to amendments in the second sentence of Section 3(E) because there are no amendments at the time of filing.
Response: The Department agrees; the change has been made to the rule.

Comment #8. Commenter #2 interprets Section 3(E) of the rule to state that an application will not be made available to the public if a hearing will not be held. The commenter argues that applications should be available to the public upon submission to the Department.

Response: A change is not necessary given the scope of the rule. Chapter 3 addresses requirements for those applications on which a hearing is scheduled and does not alter other provisions of rule which require that applications be available for review and comment. However, to avoid any confusion, the provision has been modified to reiterate that all applications filed with the Department are available to the public.

In response to Comments #6, # 7, and #8, Section 3(E) is revised to read as follows:

> **E. Availability of Application Materials.** "All applications filed with the Department are available for public inspection, copying and comment. At the time an application is filed with the Department, a copy of the application and its supporting documents~~, and all amendments to an application~~ must be filed by the applicant with the appropriate town or city clerk or, if the project is in an unorganized territory, with the county commissioners. Once the Department determines that a hearing will occur, the applicant must make copies of the complete application ~~must be made~~ reasonably available to the parties and ~~the public~~ interested persons. Availability may be in the form of paper or electronic versions as determined by the Presiding Officer. Any subsequent amendments, modifications, response to comments, or other supplemental filings must be served on all parties and filed by the applicant with the appropriate town or city clerk or, if the project is in an unorganized territory, with the county commissioners. If the Presiding Officer determines that such new or additional information is significant or substantially modifies the activity proposed in the application, the applicant shall provide written notice of the filing to interested persons and shall make a copy of the filing reasonably available to interested persons who request a copy in writing."

Comment #9. With respect to Section 3(G), Commenter #5 states that given the broad definition of interested persons, it may not be practical to provide copies of all orders, decisions and notices to the entire list.

Response: The Department agrees that providing paper copies of all of these documents to parties and interested persons is not practical. The rule has been changed to indicate that in most circumstances these documents may be provided electronically. The text of Section 3(G) of the rule is modified to read as follows:

> "The Presiding Officer shall ensure that all orders, decisions and notices of hearings and Board meetings issued by the Department are provided to parties and interested persons. Except as set forth in Sections 12 and 28 of the rule, or as otherwise ordered by the Presiding Officer, these documents may be provided electronically. Service of a subpoena is the responsibility of the requesting party."

Section 4. Presiding Officer

Comment #10. With respect to Section 4(A), Designation of Presiding Officer, Commenter #3 notes that the rule allows the Commissioner to designate an employee or agent of the Department to serve as Presiding Officer in a Commissioner hearing. Prior

language specified a "qualified employee" and used the term "representative" rather than "agent." The commenter argues that the Department deals with a range of highly particularized subjects that require expert knowledge to fully comprehend and that the Presiding Officer must have knowledge and skills commensurate with the task. The commenter argues that the rule should require that the Presiding Officer be "a qualified employee or representative of the Department who is designated by the Commissioner."
Response: *The rule is consistent with the APA which uses the term "agent" as opposed to "representative." With respect to use of the term "qualified," the Commissioner is aware of the complexities associated with the laws the Department administers and will utilize judgment in appointing a Presiding Officer for a given proceeding. No change was made to the rule.*

Comment #11. Commenter #1 comments that Section 4(B) of the rule should be amended to require that the substitute Presiding Officer must be a person who has heard all of the testimony.
Response: *The rule provides that if replacement of the Presiding Officer will result in substantial prejudice to any party, the hearing will commence anew. Whether prejudice to any party will result must be determined on a case-by-case basis and will be a function, in part, of the point in the hearing at which the substitution occurs. Additionally, the substitute Presiding Officer may have the opportunity to review transcripts of the hearing prior to the point of substitution and otherwise familiarize him or herself with the record. No change was made to the rule.*

Comment #12. Commenter #1 recommends inserting the following language in Section 4(C)(1) regarding the Presiding Officer's authority: "identify statute and rules that are applicable to the proceeding in consultation with the Attorney General and the parties."
Response: *The Presiding Officer always has the aid and advice of the Office of the Attorney General in this and other matters pertaining to the hearing. While the parties have input into the identification of relevant statutes and rules, there is no requirement that the Presiding Officer obtain agreement from the parties. No change was made to the rule.*

Comment #13. Commenter #5 recommends that Section 4(C)(3) be revised to read: "rule upon the relevance and admissibility of evidence"
Response: *The Department disagrees. Relevance is central to the question of admissibility and the addition of the term here would be redundant. The language of the rule is consistent with the APA (5 MRS § 9062(3)(B)). No change was made to the rule.*

Comment #14. Commenter #5 recommends inserting the following language in Section 4(C)(4): "limit the issues to be heard if doing so would facilitate a fair and efficient hearing and the parties and the Presiding Officer agree to such limitation, or if no prejudice to any party would result;"
Response: *The existing language allows the Presiding Officer the ability to limit the issues for reasons other than fairness and efficiency if the parties agree or if no prejudice to any party will result. Section 4(C)(11) allows the Presiding Officer to take fairness and economy into consideration. No change was made to the rule.*

Comment #15. Commenter #2 states that Section 4(D) of the rule only provides for appeal of the Presiding Officer's pre-hearing rulings and argues that the provision should also apply to appeals of Presiding Officer rulings made during and after a hearing.
Response: The APA (5 MRS § 9062) authorizes the Presiding Officer to regulate the course of a hearing and does not provide any opportunity for parties to appeal a ruling of the Presiding Officer. The rule is structured to resolve as many procedural and evidentiary issues as possible prior to the hearing with input from the parties and provides an appeal opportunity for certain rulings for that purpose; however, to allow appeal of the Presiding Officer's rulings during and after the hearing could be very disruptive to the conduct of the proceeding. Parties may state objections that occur during and after a hearing on the record to preserve them for appeal. No change was made to the rule.

Comment #16. Commenter #5 requests that Section 4(D) of the rule be modified to allow appeals of the Presiding Officer's rulings under section 4(C)(9) (issues of procedure), section 4(C)(11) (variance from procedures) and section 4(C)(12) (other actions necessary for the efficient and orderly conduct of the hearing). The commenter also proposes clarifying language regarding appeals of the Presiding Officer's rulings when the Presiding Officer is not the Commissioner. Commenter #1 also comments that rulings under Section 4(C)(9) and 4(C)(11) should be subject to appeal to the full Board or the Commissioner.
Response: As stated above in response to Comment #15, the APA (5 MRS § 9062) authorizes the Presiding Officer to regulate the course of a hearing and does not provide any opportunity for parties to appeal a ruling of the Presiding Officer. The rule provides for an appeal of certain of the Presiding Officer's pre-hearing rulings, but expansion of the appeal provision beyond that set forth in the rule would compromise the ability of the Presiding Officer to conduct the proceeding. The suggested clarification regarding Commissioner hearings is accepted. The first sentence of Section 4(D) is amended to read:

> "Pre-hearing rulings made pursuant to section 4(C)(1) through 4(C)(5) are appealable to the full Board in Board licensing proceedings and to the Commissioner in Commissioner licensing proceedings where the Commissioner is not the Presiding Officer."

Section 5. Department Staff

Comment #16. Commenter #5 requests that Department staff acting in the capacity described in the introductory paragraph of Section 5 be so designated.
Response: The Department agrees that the term "Department staff" refers not to all Department staff but to those staff members of the Department who either are assigned to a licensing matter or who assist in the Department's analysis of the application. All of the specific staff members who will assist in the analysis may not be known at the outset of the hearing process. No change to the rule was made.

Comment #17. The introductory paragraph in Section 5 states that "Department staff may communicate with the applicant regarding information sought on specific license criteria." One commenter (#3) states that Department staff should be able to communicate with all parties, not just the applicant.
Response: The sentence in question is intended to be consistent with 38 MRS § 344(1) which provides that "Acceptance of an application as complete for review does not constitute a determination by the department on the sufficiency of that information and does not preclude the department from requesting additional information during processing." See also section 16(A) of the rule. To make this clear, the word "additional" is added to the sentence so that it now reads: "Department staff may communicate with the applicant regarding additional information sought on specific license criteria." The Department agrees that, consistent with past practice, Department staff must be able to communicate with a party, including an intervenor, regarding procedure, evidence or other materials submitted by that party. The following sentence is added: "Department staff may also communicate with any party regarding procedure, evidence or other materials submitted by that party."

Comment #18. Several comments were received on the following sentence in Section 5(B) regarding the timing of submission to the parties of review comments from outside agency review staff: "Such materials should be submitted sufficiently in advance of the hearing that the parties have adequate opportunity to review the materials in preparation for the hearing." Commenter #5 recommends that the sentence be deleted as it should be the subject of a procedural order to allow appropriate scheduling flexibility. Two commenters (#1 and #4) state that this requirement should be mandatory (objecting to the term "should") and suggest specific deadlines. One (#4) suggests a deadline concurrent with the deadline for applicants and intervenors to submit pre-filed testimony. The other (#1) suggests a deadline of no later than the time for filing pre-filed direct testimony, or, if no pre-filed direct testimony is required, at least 21 days prior to the hearing.

Response: Title 38, Section 341-D(2) provides that "the board shall ensure that that department and any outside agency review staff assisting the department in its review of the application have submitted to the applicant and the board their review comments on the application and any additional information requests pertaining to the application and that the applicant has had an opportunity to respond to those comments and requests. If additional information needs arise during the hearing, the Presiding Officer shall afford the applicant a reasonable opportunity to respond to those information requests prior to the close of the hearing record." The Department disagrees that a specific deadline for submission of review comments should be specified in the rule; however, the language of the rule is changed as set forth below to ensure consistency with the statute. The date by which review comments must be submitted is best determined on a case-by-case basis by the Presiding Officer and, as suggested by one commenter, memorialized in a procedural order.

Some confusion regarding the mandatory nature of the requirement may have arisen because the applicable provisions were placed in two different sections of the proposed rule: Sections 5(B) and 16(E). To rectify this, Section 16(E) is eliminated, the third

sentence is removed from Section 5(B), and the substance of these provisions are consolidated in new subsections C and D of Section 5, with the clarification that all review comments shall be submitted to the persons listed on the service list maintained for the licensing proceeding:

C. **Review Comments on Application.** Department staff and any outside agency review staff assisting the Department in its review of the application shall submit any review comments on the application sufficiently in advance of the hearing so that the applicant has an opportunity to respond to those comments and all parties have an opportunity to review the applicant's responses. The review comments shall be submitted to the persons listed on the service list maintained by the Presiding Officer pursuant to section 3(B). This subsection does not preclude Department staff from using at any time the experience, technical expertise and specialized knowledge of hired consultants and outside agency review staff in its analysis of the evidence during the hearing and after the hearing record has closed.

D. **Additional Information from Applicant.** If Department staff or the Presiding Officer requests additional information from the applicant pursuant to section 16(A), such requests shall be made sufficiently in advance of the hearing so that the applicant has an opportunity to respond to those requests and all parties have an opportunity to review the applicant's responses. If additional information needs arise during the hearing, the Presiding Officer shall afford the applicant a reasonable opportunity to respond to those information requests prior to the close of the hearing record.

In addition, to make it clear that only Department staff or the Presiding Officer may request additional information from the applicant, not outside agency review staff, Section 5(B) now states that outside agency review staff may recommend that Department staff seek additional information.

Subsections C and D of Section 5 of the rule are accordingly re-lettered subsections E and F.

Comment #19. One commenter (#1) states that the requirement in Section 5(B) to provide notice to the parties of the availability of materials received from hired consultants or outside agency review staff should be mandatory, not discretionary.
Response: The Department agrees and has made this change.

Comment #20. Newly labeled Section 5(E) (found at section 5(C) of the proposed rule) provides that if the Presiding Officer asks hired consultants or outside agency review staff to appear at the hearing to respond to questions regarding review comments submitted to the record, the Presiding Officer may, at his or her discretion, allow parties to ask questions of the hired consultant or outside agency review staff regarding their review comments. Two commenters (#1 and #4) state that parties should always be allowed to cross-examine hired consultants or outside agency review staff regarding their respective review comments, even if they have not been asked by the Presiding Officer to appear at the hearing.

Response: Department staff, hired consultants and outside agency review staff acting within the scope of Section 5 are all acting as staff to the decision-maker in a particular licensing proceeding. Generally speaking, it is not appropriate that they be called as witnesses and be subject to cross-examination just as those they are assigned to assist (the Presiding Officer, Commissioner or Board members) are not appropriately called as witnesses. However, Section

5(E) allows the Presiding Officer to ask hired consultants or outside agency review staff to appear at the hearing to respond to questions regarding review comments submitted by them to the record. The intent of this provision is to give the Presiding Officer and Board members an opportunity to ask questions of these individuals regarding their review comments, not as a matter of course but only if the Presiding Officer determines that it would be helpful to the decision making process. The Department agrees with the commenters that if the Presiding Officer decides that it would be helpful and asks hired consultants or outside agency review staff to appear at the hearing to respond to questions regarding their review comments, these individuals become witnesses subject to questioning by the parties solely with regard to their review comments. Section 5(E) has been changed accordingly.

Section 6. Ex-parte Communications

Comment #21. Commenter #1 suggests inserting the language "regarding the matter" so that the last sentence of Section 6(A) reads as follows: "For hearings conducted by the Board, no Board member participating in the proceeding may communicate directly or indirectly in connection with any issue of fact, law or procedure regarding the matter,"
Response: The Department agrees that the suggested language clarifies the provision. The change has been made.

Section 7. Impartiality

Comment #22. Commenter #1 states that consultation regarding an allegation pertaining to impartiality should occur in a public meeting.
Response: The Department disagrees. Such consultation is not a public proceeding. As the rule provides, the determination will be stated on the record. No change was made to the rule.

Comment #23. Commenter #5 requests that the rule include information on the process for deciding the matter when there is an allegation of impartiality.
Response: The process for addressing such allegations may vary from case to case and is beyond the scope of this rule. No change was made to the rule.

Section 8. Rights of Parties

Comment #24. Commenter #1 states that a party must be able to cross-examine a person who testifies whether or not the person is present at the hearing.
Response: The Department agrees that all persons testifying must be available for cross-examination. Section 19(B) requires that witnesses be present at the hearing for this purpose. The rule does not provide for a witness to appear by video link. No change was made to the rule.

Section 9. Consolidation of Proceedings

Comment #25. Commenter #1 asks for an example of when it may be appropriate to consolidate for hearing two or more related proceedings.

Response: The Board frequently receives multiple appeals of a given licensing decision. While it is rare for the Board to hold a hearing on an appeal, it has done so. In one instance there were multiple appeals of the wastewater discharge licenses issued to separate facilities that were discharging to the same waterbody. In that and similar circumstances, the matter cannot be decided without considering the merits of all of the appeals simultaneously. No change was made to the rule.

Section 10. Location of Hearing

Comment #26. Commenter #3 supports the provision that requires that a hearing be held at a location significantly affected by the license application. Commenter #1 argues that use of the term "significantly affected" prejudices the issues and the rule should use the term "potentially affected." Commenter #5 argues that the phrase "or which are concerned about the issue" should be stricken as vague and states that it may not be appropriate in all instances. The commenter states that the issue of location is best addressed by the Presiding Officer based on the specific circumstances of the application.
Response: The APA (5 MRS §9052-A) states that the agency "shall strive to hold a hearing in the area or areas of the State which are significantly affected by the license application or which are concerned about the issue." The Presiding Officer will determine the location of the hearing in consultation with the parties. No change was made to the rule.

Section 11. Public Participation

A. Intervention

Comment #27. Commenter #1 states that a petitioner should be required to submit a list of its members. The commenter argues that such a list is needed to ensure that the petitioner does not circumvent the rules for intervenor parties during the public comment section of the hearing.
Response: The Department disagrees. The APA (5 MRS § 9054(2)) provides for public participation in a hearing. In the case of a statewide organization, an intervenor may have a substantial number of members, a municipality includes many residents, and an applicant may have many employees. In such cases, members, residents or employees are not precluded from testifying during the public comment portion of the hearing. In fact, all such members, residents or employees might not share a single view on the matter which is the subject of the hearing. It is the practice of the Department to caution intervenors not to use the public portion of the hearing to circumvent the rules. The Presiding Officer is able to manage the situation and take appropriate action. No change was made to the rule.

Comment #28. Commenter #4 suggests eliminating the sentence in Section A(1) that allows the Commissioner, the Board or the Presiding Officer to allow, in addition to persons who would be "substantially and directly affected," any other person to intervene and participate as a party at its discretion. The commenter argues that this provision creates uncertainty regarding who ultimately participates and may unfairly

open the door to individuals or groups who do not have a credible relationship to the proposed project. Commenter #1 submitted a similar comment.
Response: The language in the rule is consistent with the APA (5 MRS § 9054(2)) which grants the agency such discretion. No change was made to the rule.

Comment #29. Commenter #5 suggests inserting the "identification of the petitioner" in the list of information to be included in the petition to intervene.
Response: The Department agrees. The language has been added to the rule.

Comment #30. Commenter #5 requests that the petition "identify the names of one or more individuals who are members of the organization and who have decision-making authority for the organization."
Response: The Department disagrees. The commenter's proposed language could be construed to require a level of group organization that may not exist. The courts have upheld the right of ad hoc groups that form to address specific applications to participate in hearings. The name of the spokesperson for the organization is sufficient. No change was made to the rule.

Comment #31. Commenter #5 requests that the rule be amended to establish as a criterion for intervenor status a finding that the petitioner "has demonstrated an ability and willingness to participate in the proceeding in accordance with applicable rules."
Response: The proposed criterion is not a requirement imposed by the APA. For practical purposes, a person granted intervenor status who is unwilling or unable to comply with the statute, rules and procedural orders will effectively limit their participation. If a party does not attend pre-hearing conferences, it may waive its right to appeal rulings made as a result of such a conference as set forth in Section 15(E) of the rule.

Comment #32. With respect to Section 11(A)(3) of the rule, Commenter #1 states that the licensee should be granted automatic intervenor status in the case of an appeal.
Response: The Department agrees. The change has been made to the rule.

Comment #33. Commenter #1 states that language should be added to Section 11(A)(3) of the rule limiting an appeal hearing to the appellant(s) and the licensee, arguing that others should not be allowed another bite at the apple.
Response: The Department disagrees. Other persons who have a substantial interest in the matter may not have appealed a decision because they were in agreement with the decision. If a hearing is scheduled, the APA provides for public participation and does not limit the ability of persons to petition to intervene. No change was made to the rule.

Comment #34. Commenter #1 also recommends inserting language in Section 11(A)(3) that limits the hearing to the issues raised in the appeal.
Response: Section 8 of the rule states, "Unless limited by stipulation of the parties or order of the Presiding Officer under this rule, every party has the right to present evidence and argument on all issues in contention..." The issues to be decided in the hearing process are the issues raised in an appeal; however, the Department may allow

evidence on other aspects of an application to provide context. No change was made to the rule.

Comment #35. Commenter #1 recommends inserting language in Section 11(A)(5) to prevent members of an intervenor organization from submitting written or oral comments or testimony separate from the testimony provided by the organization.
Response: The Department disagrees. See response to Comment #27. No change was made to the rule.

B. Participation by a Non-Intervenor

Comment #36. Commenter #1 argues that non-intervenors should not be allowed to testify or submit written questions through the Presiding Officer, but rather only be allowed to submit written comment.
Response: The Department disagrees. The APA provides for public participation in a hearing. No change was made to the rule.

Comment #37. Commenter #4 states that the language allowing testimony and evidence by non-intervenors is more broad than the existing rule and raises the question of whether non-intervenors can be subject to cross-examination when they testify or present evidence. The Commenter notes overlap between this section and Sections 19(C) [Testimony from the Public] and 19(D) [Questions from the Public] and requests that the language be clarified or the section be eliminated.
Response: Members of the public testifying at a hearing may submit exhibits and are subject to cross-examination by the parties consistent with current practice. The rule does not expand the rights of non-intervenors. No change was made to the rule.

C. State, Federal, Municipal and Other Governmental Agencies

Comment #38. Commenter #1 recommends amending Section 11(C) of the rule to provide for cross-examination of agency representatives who submit written comments on an application.
Response: This section of the rule does not pertain to intervenor agencies or those who are assisting Department staff in their review of an application. A governmental agency may choose to comment on an application; however, an agency which submits written comments on an application is not required to attend a hearing for cross-examination. No change was made to the rule.

Comment #39. Commenter #4 argues that the standard in Section 11(C) of the rule that allows governmental agencies who have not petitioned to intervene to participate in a hearing should be eliminated entirely or redrafted to include deadlines for determining participation. Otherwise late entrance by interested agencies that did not petition to intervene could be disruptive and prejudicial.
Response: The language in the proposed rule is consistent with the APA (5 MRSA § 9054(2)); however, the Department agrees that a governmental agency wishing to participate in this capacity must notify the Department of its interest in participating in

the licensing proceeding sufficiently in advance of the hearing so that the Department and the parties are aware of the agency's desire to participate and so that the agency can be made aware of any requirements for participation. The rule has been amended to specify that the Department must be notified of the agency's interest in participating at least 20 days prior to the start of the hearing.

Section 12. Public Notices

Comment #40. Commenter #3 requests that Section 12(A) specify that notice to the persons listed be provided at least 30 days, rather than 10 days, prior to the deadline for the filing of a petition to intervene given the level of interest they are likely to have in the proceeding and to provide adequate time for them to carefully contemplate and investigate whether or not to intervene.
Response: In instances where a public hearing will being held, the application has generally been pending before the Department for several months prior to the hearing giving interested persons ample opportunity to consider whether or not to petition for intervention. Additionally, the Department notes that the 10 day notice of opportunity to intervene is a minimum requirement and, in complex proceedings, the Department may elect to provide even greater notice. No change was made to the rule.

Comment #41. Commenter #2 states that the rule increases the notice of hearing from 10 to 30 days and that this is an improvement.
Response: The rule does not change the length of the notice period for hearings. The APA (5 MRS § 9051-A(2)) requires that notice of the hearing "shall be provided 30 days next prior to the scheduled initial hearing."

Comment #42. Commenter #5 noted a typographical error in section 12B(4). Notice of a continued hearing is subject to section 19(E), not 18(F).
Response: The correction has been made.

Section 13. Subpoenas

Comment #43. Commenter #3 argues that the requirement in the introductory paragraph that a party "exhaust all other means of procuring attendance of the witness or the information sought before requesting a subpoena" places too onerous a burden on intervenors and interested persons.
Response: The intent of the rule is to encourage parties to cooperate with one another rather than simply resort to subpoenas, which are time consuming and resource intensive, when it may be possible to obtain the appearance of the witness or the production of information through less costly means. The Department agrees that the language should be modified to better reflect the intent of the rule. The language is revised to read as follows:

> "Prior to requesting a subpoena, the party shall exhaust all other reasonable means of procuring attendance of the witness or the information such as asking for voluntary attendance or submission of information."

Comment #44. Commenter #3 comments that the rule strips the right of parties and others to seek enforcement of a subpoena in Superior Court. Commenter #1 argues that a party should be able to apply for such an order.
Response: In accordance with 38 MRS § 345-A(4) of the Department's governing statutes, only the issuer of the subpoena may apply to Superior Court for an order to compel compliance with the subpoena. No change was made to the rule.

Comment #45. Commenter #3 objects to the provision in Section 13(C) which states that Department staff, outside agency review staff, and Department hired consultants who assist the Presiding Officer, Commissioner or Board are not subject to a subpoena. The commenter argues that this provision is inconsistent with concepts of transparent governmental processes. Commenter #1 asked for clarification of this provision. Commenter #5 argues that a blanket prohibition on the ability to subpoena staff could result in substantial prejudice and that anyone providing substantive evidence should be subject to cross-examination in certain circumstances.

Response: The provision limiting subpoena of staff does not extend to all employees of the Department (or all employees of other state agencies or consultants), but rather to those persons serving as staff to the decision-maker in a non-advocate capacity as set forth in Section 5 of the rule. These persons are not witnesses for any party, but rather assist the decision-maker in the gathering and evaluation of evidence. As staff to the decision-maker, such persons are no more subject to subpoena under the law than the decision-maker. Any comments these persons enter into the record are a public record and available to all. If such persons are asked by the Presiding Officer to respond at the hearing to questions regarding comments they have submitted to the record, the Presiding Officer will allow the parties to ask questions of these persons regarding their review comments. See also response to Comment #20. No change was made to the rule.

Comment #46. The introductory paragraph includes the following sentence: "Any party may request the issuance of a subpoena in the name of the Department to require the attendance and testimony of witnesses and the production of any evidence relating to any issue of fact in the licensing proceeding." Commenter #5 requests that the words "of fact" be stricken from the sentence.
Response: The Department disagrees. The primary purpose of the hearing is to gather and evaluate facts. The language in the rule tracks the APA. No change was made to the rule.

Section 15 Conferences

Comment #47. Commenter #2 notes that the rule states that participation in conferences is limited to the parties and participating agencies. The commenter argues that this is a change that decreases opportunity for public engagement and that such conferences should remain open to the public and on the record.
Response: Conferences are open to the public and a record is made of all such conferences. However, participation at conferences, which are held to address

procedural matters and otherwise plan for the hearing, is necessarily limited to the parties and participating agencies. To avoid confusion, the rule has been modified as follows:

> "Conferences may be held at the discretion of the Presiding Officer at any time prior to, during, or after a hearing. Members of the public may attend conferences; however, participation is limited to the parties to the proceeding and any agency participating pursuant to section 11(C) except by leave of the Presiding Officer."

Comment #48. Commenter #5 suggests that section A(8) be re-worded as follows: "consider such other matters that may be necessary or advisable in order to facilitate an orderly, timely and fair ~~expedite and facilitate the~~ hearing process."
Response: The Department agrees with the suggestion. Ensuring a fair process is included in the goals of pre-hearing conferences. The provision is modified to read:

> A(8) "consider such other matters as may be necessary or advisable in order to ~~expedite and~~ facilitate an orderly and fair hearing process and to expedite the hearing process."

Section 16. Pre-Hearing Submissions

Comment #49. Commenter #1 argues that Section 16(E) should establish a deadline for agency review comments after which the agency forfeits the opportunity to comment. Commenter #2 states that the language needs to be changed to clarify that agency comments also need to be shared with the intervenors and made available to the public.
Response: The issue of access to agency comments is addressed in revisions to Section 5. Section 16(E) is deleted to avoid confusion. See response to Comment #18.

Section 17 Modification of a Pending Application

Comment #50. Commenter #1 recommends inserting the following sentence: "Responses to agency requests for additional information do not constitute a modification of an application."
Response: The response may constitute a modification of the application, although that is not necessarily the case. No change was made to the rule.

Section 18. Withdrawal of an Application

Comment #51. Commenter #1 stated at the hearing that he believes an applicant should be allowed to withdraw its application by right at any time. In written comments, Commenter #1 acknowledges that there may be a point in a proceeding post-hearing, but prior to the actual decision, beyond which permission to withdraw an application from the agency should be required. The commenter states that the time should be at or after the issuance of a draft Department decision. The commenter has suggested language to this effect.

Response: The intent of this provision is to prevent unfairness to participating parties and unnecessary expenditure of Department resources, which could occur in a situation in which an applicant could withdraw an application shortly before a hearing, or after it in the face of a potential adverse result. It is also intended to prevent repeated filing and withdrawal of applications and to encourage applicants to have their best evidence prepared before filing an application. No change was made to the rule.

Comment #52. Commenter #3 strongly supports this provision of the rule stating that the provision is equivalent to how a court might operate when a proceeding is far enough along that a ruling is imminent. Commenter #5 proposes to modify section 18(C) to read as follows: "the amount of resources expended up to that point by the parties, the public, and the Department and additional resources needed to fully adjudicate the matter."
Response: The Department agrees that Commenter #5 has identified an important consideration. The rule has been modified to include the recommended language.

Section 19. General Conduct of Hearing

Comment #53. With respect to Section 19(B)(2) of the rule, Commenter #1 argues that testimony at a hearing on an appeal should be limited to the appellant, the licensee if different from the appellant, and governmental agencies.
Response: The Department disagrees. The APA provides for public participation in a licensing hearing. (See 5 MRS § 9054). There may be situations in which neighboring landowners, citizen groups, or other entities have participated in the licensing process and have an interest in the outcome of the appeal. Evidence and argument from such other persons and entities may be helpful to the Department. No change was made to the rule.

Comment #54. With respect to Section 19(C) Testimony from the Public, Commenter #1 argues that members of an intervenor organization should not be permitted to submit written or oral comments or testimony separate from the testimony provided by the intervenor organization.
Response: The Department disagrees. See response to Comment # 27. No change was made to the rule.

Comment #55. Commenter #2 opposes what the commenter views as a narrowing of the opportunity for public comment. With respect to Section 19(C), the commenter objects to the statement that the Presiding Officer "**may** designate a section of the hearing for public testimony" arguing that there should always be an opportunity for the public to comment. With respect to Section 19(D), the commenter states that the Presiding Officer should ensure ample time for the public to pose questions through the Chair.
Response: Sections 19(C) and 19(D) do not narrow the opportunity of the public to comment. The Department always affords an opportunity for public testimony and for written comments in a licensing hearing process. Section 19(C) simply puts all persons on notice that the opportunity may be at a session reserved exclusively for that purpose. With respect to Section 19(D), the Department agrees that the Presiding Officer should strive to provide ample time for the public to pose questions through the Presiding

Officer during the course of the hearing. However, the Presiding Officer needs to retain the authority to regulate the course of the hearing and must retain the flexibility to allocate time as the Presiding Officer deems appropriate. No change was made to the rule.

Section 20. Evidence

Comment #56. Commenter #1 states Section 20(D)(2) regarding documentary evidence should specify that parties "shall" as opposed to "may" be provided with an opportunity to respond regarding the content of an exhibit.
Response: The Department agrees. The change has been made.

Comment #57. Commenter #4 states that demonstratives are an essential part of a licensing proceeding and are used by parties to present information in "high level summary format" to the Board. The commenter states that, in the past, parties have been prevented from utilizing demonstratives that had not been pre-filed. The commenter argues that demonstratives should always be allowed where the parties can show that the demonstrative is based on evidence already in the record. The rule should more clearly explain and define the use of demonstratives at hearings.
Response: The Board has required that demonstratives other than simple enlargements of previously submitted documents be pre-filed to ensure that the other parties have an opportunity to review and verify their contents prior to the hearing. This is especially critical if the demonstrative presents technical information in "high level summary format;" *otherwise, conduct of the hearing is disrupted and additional time needs to be allocated for review and verification of the information before the hearing can proceed. No change was made to the rule.*

Comment #58. Commenter #4 comments that parties should be allowed to use any document, including those not in the record, for the purpose of impeaching the credibility of a witness.
Response: The Department agrees that the parties have the right to present documents for the purpose of impeaching the credibility of a witness and the rule does not prevent that.

Comment #58: Commenter #1 recommends inserting the following sentence in Section 20(E): "An appeal of a Presiding Officer's ruling is not necessary to preserve a Party's objection for the purpose of judicial appeal."
Response: This statement appears in Section 4(D) of the rule and does not need to be repeated here. No change was made to the rule.

Comment #59. Commenter #2 argues that the proposed rule should be changed to allow the Presiding Officer's rulings to be appealed to the full Board.
Response: Objections made prior to the hearing may be appealed as set forth in Section 4 of the rule. See also response to Comments #15 and #16 on Section 4. No change was made to the rule.

Section 21. Closing Argument

Comment #60. Commenter #1 argues that the applicant should be allowed to present its oral argument last if it chooses because the applicant bears the burden of proof.
Response: The Department agrees that in an initial licensing proceeding, the applicant should be allowed to present its oral argument last if the applicant so chooses. However, in an appeal proceeding where the appellant is not the applicant, the appellant should have the option to present last. The rule has been amended to include these provisions.

Section 26. Board Deliberations

Comment #61. Commenter #1 recommends specifying that a majority of the Board members need to determine that a deliberative session is necessary.
Response: The Department disagrees. The Presiding Officer will determine, in consultation with Board members, whether or not a deliberative session will be held. No change was made to the rule.

Section 28 Decisions

Comment #62. Commenter #3 supports the provision which requires a copy of the decision to be provided to each party to the proceeding and interested persons.
Response: No change to the rule.

Comment #63. Commenter #5 recommends that the proposed rule be modified to specify that the copy of the license decision be sent by certified mail, return receipt requested, "to the persons identified on the Service List described in Section 3B above."
Response: The Service List is too broad in that it often includes multiple persons for each party as well as staff and Assistant Attorneys General and others who do not need to receive the decision via certified mail. Staff does, however, appreciate the need for greater clarity on this issue and has revised the provision to read as follows:

> "All correspondence notifying the parties of the license decision must be by certified mail, return receipt requested, to each party's designated representative as identified on the Service List in Section 3B above."

Section 30. Post Decision Notice Requirements

Comment #64. With respect to Section 30(A) concerning license conditions, Commenter #5 recommends that notice to parties of actions taken to comply with conditions contained in a license that require Department review and approval be limited to those which are submitted within one year of license issuance. With respect to Section 30(B) regarding notice of certain amendment applications, Commenter #5 recommends that Section 30(B) apply to any application to amend a license submitted within one year of the license issuance, that notice be as provided for in Section 3 of the rule, and that the Presiding Officer may require notice of amendments after 1 year if set forth in a procedural order. Commenter #1 questions the need for this provision, but argues that if

it is retained there should be a materiality threshold; non-material changes should not trigger notice to former parties.
Response: *With respect to Section 30(A), conditions often are designed to provide assurance that a license holder will comply with the applicable statutory criteria and notice to former parties so that they may comment is in the public interest. No change was made to the rule. With respect to Section 30(B), the Department agrees with Commenter #5 that the notice requirement should apply more broadly to any license amendment, and has made that change to the rule. The rule has also been modified to provide for the notice requirement to extend for greater than one year if so stated in the license decision. With respect to Commenter #1's request that the requirement in Section 3(B) extend only to proposals that "materially" vary, the Department disagrees. Materially is subject to interpretation and amendments that are not complex may nevertheless be of substantial interest to the parties. Finally, to ensure consistency with Chapter 2 section 21(B) of the Department's rules, a third provision Section 30(C) has been added to address amendments regarding an issue which was the subject of an appeal.*

General Comments

Comment #65. Commenter #1 asked whether terms which are defined in the Definitions section of the rule should be capitalized wherever they appear in the rule.
Response: *It is not necessary to capitalize all defined terms. No change was made to the rule.*

Comment #66. Commenter #3 stated that the terminology in the rule should be gender neutral.
Response: *Staff agrees; minor edits have been made to use gender neutral terms.*

Comment #67. Commenter #3 requests that the rule state that, to the extent a term is not defined in Chapter 3, it will be interpreted consistent with its meaning under the APA.
Response: *The Department has many governing laws which may define terms somewhat differently; therefore, a blanket statement regarding the definition of terms is not appropriate. No change was made to the rule.*